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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Bell Atlantic Corporation	)	CC Docket No. 98-11
For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	
	)	
Petition of U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26
	)	
Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology	)	CC Docket No. 98-32
	)	
Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act	)	CCB/CPD No. 98-15 RM 9244
	)	
Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996	)	CC Docket No. 98-78
	)	
Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service	)	CC Docket No. 98-91

299380.2

COMMENTS OF
FOCAL COMMUNICATIONS CORPORATION,
HYPERION TELECOMMUNICATIONS, INC., D/B/A
ADELPHIA BUSINESS SOLUTIONS
AND
KMC TELECOM INC.

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SUMMARY

Advanced services when used to connect to Internet Service Providers are, by defintion, used to connect the user to an information service. Therefore, advanced services cannot constitute "exchange access" under the Act since "exchange access" is defined in terms of connection to "telephone toll service" which is a telecommunications service.

Advanced services constitute "telephone exchange service" under the Act. Congress did not intend to exclude advanced networks of the future from state authority or assign to the Commission exclusive jurisdiction over them. Advanced services such as DSL fit squarely within the statutory definition of "telephone exchange service" because advanced services are "comparable" to traditional local exchange service.

There is no basis to conclude that advanced services constitute a new category of service provided by local exchange carriers - information access. Congress did not establish or define such a category in the Act.

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AND
KMC TELECOM INC.

Focal Communications, Inc. ("Focal"), Hyperion Telecommunications, Inc., d/b/a Adelphia Business Solutions ("Adelphia"), and KMC Telecom Inc. ("KMC") respectfully submit these comments in response to the Commission's request for comment on issues raised by the voluntary remand of the *Advanced Services Order* in this proceeding.[1] Focal, Adelphia, and KMC submit that under the applicable statutory definitions advanced services are not "exchange access service" but are "telephone exchange service." Advanced services do not constitute "information access" - a category of service that is not defined in the Act - that might not be subject to the key market-opening obligations of Section 251 of the Act.

ADVANCED SERVICES ARE NOT "EXCHANGE ACCESS SERVICE"

Under the Act, "exchange access service" is defined as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[2] "Telephone toll services" in turn, is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not

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[1] *Comments Requested in Connection with Court Remand of August 1998 Advanced Services Order*, Public Notice, CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147, DA 99-1853, released September 9, 1999; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, CC Docket No. 98-147, FCC 98-188, released August 7, 1998 ("*Advanced Service Order*").

[2] 47 U.S.C. Sec. 3(16).

included in contracts with subscribers for exchange services."[3] Further, although not included in the statutory definition, telephone toll service constitutes "telecommunications" as defined in the Act. Therefore, under the Act, a service can be "exchange access" only when it offers access for the origination or termination of telecommunications.

However, advanced services, as defined in the *Advanced Services Order* can be used to provide connection to an Internet service provider ("ISP") that in turn connects the user to the Internet.[4] ISPs do not offer or provide telecommunications service. Instead, the Commission has determined in the clearest possible terms that ISPs under the applicable statutory definitions offer exclusively "information services" even though they use telecommunications to provide their service. In its *Report to Congress* the Commission determined that Internet access involved information service capabilities that were "inextricably intertwined" with data transport and that the service was appropriately classified as wholly an information service.[5] Under the Commission's "contamination doctrine"addition of enhanced components to a basic telecommunications service by a non-facilities-based provider converts the entire service for regulatory classification purposes into an information service.[6] Accordingly, when an advanced

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[3] 47 U.S.C. sec. 3(48).

[4] DSL service is also used to permit users to connect to local corporate Intranets, *e.g.* to permit telecommuting.

[5] *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67, released April 10, 1998, para. 80 (" *Report to Congress*").

[6] "Under the 'contamination theory' developed in the course of the *Computer II* regulatory regime, VANs that offer enhanced protocol processing services in conjunction with basic transmission services are treated as unregulated enhanced service providers. The enhanced component of their offerings 'contaminates' the basic component, and the entire offering is therefore considered to be enhanced." *Computer III Phase II Recon. Order*, 3 FCC Rcd at 1153, n. 23.

service is used to provide access to an ISP it is not being used to provide access to telephone toll service because ISPs offer information services and, therefore, cannot constitute telephone toll service. Therefore, advanced services used to connect to ISPs cannot constitute "exchange access" service as defined in the Act. Indeed, the Commission has already determined that "[b]ecause ISPs do not provide telephone toll services, and therefore are not telecommunications carriers, they are not eligible to obtain exchange access..." and that "ISPs do not use exchange access as it is defined in the Act..."[7]

ADVANCED SERVICES ARE "TELEPHONE EXCHANGE SERVICE"

A. Congress Intended to Preserve State Authority Over Changing Local Networks

"Telephone exchange service" is defined in the Act as:

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.[8]

Focal, Adelphia, and KMC submit that Congress added part B to the definition of "telephone exchange service" in recognition of the fact that technology in contemporary communications networks is changing rapidly and becoming increasingly digital. Indeed, under the Commission's own expansive definition of advanced services any data service faster than

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7 *Non Accounting Safeguards Order*, 11 FCC Rcd 22023-24.para. 248.

8 47 U.S.C. Sec. 3(47).

200kbps is an advanced service.[9] At the same time, voice services can be provided by means of underlying advanced services such as voice over DSL. It is therefore likely that in the not too distant future most or all communications traversing local communications networks, including all the way to the customer's premises, will be advanced services as the Commission has defined them.

Traditionally most usage of the local network has been subject to state regulation. In adding part B to the definition of "telephone exchange service' Congress intended to preserve traditional state authority over the local network when used to provide data services even when such services are part of jurisdictionally interstate communications. Nothing in the Act or its legislative history would support the radical transformation of the boundaries of federal/state authority that would be established if advanced services were not categorized as "telephone exchange service." In other words, as data communications become the predominant use of the local network, states would be virtually ousted from authority over these services if data services are not viewed as "telephone exchange service" subject to the limitation on federal authority over "telephone exchange service" under Section 221(b) of the Act.

And yet, the trend of recent Commission decisions has been to assign exclusive federal authority to usage of the local network for connections to the Internet. Thus, in the *DSL Tariff Investigations,* the Commission determined that DSL in an exclusively federal service even in the

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[9] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, CC Docket 98-146, FCC 99-5, released February 2, 1999, para. 20.

absence of any concrete evidence as to what percentage of DSL traffic is actually interstate.[10] The Commission also erroneously - for the reasons discussed above - determined that DSL service when used to connect to the Internet is a form of exchange access service. In the *Dial-Up Order*, the Commission determined that dial-up calls to ISPs are predominantly interstate, again without any record evidence as to what percentage of calls to ISPs could be considered jurisdictionally interstate.[11] In short, the Commission appears to be embarked on a path of ousting states from authority over the advanced services networks of the future. Focal, Adelphia, and KMC urge the Commission to resolve the issues on remand in this proceeding in a way that will preserve state authority by defining advanced services as "telephone exchange service."

B. Advanced Services Comport with Part B of the Statutory Definition

Advanced services constitute "telephone exchange service" under part B of the statutory definition because they are "comparable" to services described in part A. Focal, Adelphia, and KMC submit that the core meaning of traditional "telephone exchange service" is the fact that telephone exchange services are subject to the same charge within the local exchange area. Thus, the charge for calling within the area is the same throughout the exchange. And, this is exactly the situation for DSL service in that there is a single charge for DSL service throughout the area in which it is offered. Accordingly, DSL service is comparable to traditional telephone exchange

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[10] *See, e.g.* GTE Telephone Operating Cos. GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC 98-292, released October 30, 1998, *recon denied*, FCC 99-41, released February 26, 1999.

[11] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-38, released February 26, 1999 ("*Dial-Up Order.*)

service in this respect. Another key feature of telephone exchange service is that it is offered to end users. DSL service is comparable to traditional local exchange service in this respect as well. In addition, DSL permits users to intercommunicate within the area subject to the DSL charge, and even within the same voice telephone local exchange area. In particular, users may use DSL for telecommuting to local corporate Intranets. They may also use DSL to send email via their ISP to other users in the same area.

At the same time, the Part B definition accommodates the differences between advanced services and traditional local exchange service. Part B provides that services meeting that definition may be provided by means of "a system of switches, transmission equipment, or other facilities (or combination thereof) ..." Thus, non-switched services can fit within the Part B definition since the system used to provide the services within that definition can be comprised of switches "or" other equipment. In any event, advanced services can be switched.[12]

Similarly, advanced services are accommodated within Part B when it defines a "telephone exchange service" as one "by which a subscriber can originate and terminate a telecommunications service." Assuming that this statement means that the service must originate and terminate within the exchange service area, or DSL service area, for example, DSL

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[12] "Subscribers typically set up what are termed 'permanent virtual connections' in routing their traffic across a packet-switched network. Such a connection, which gives the end user an 'always-on' connection over a preset physical path, is easier to provision than a 'switched virtual circuit,' in which the connection path is determined on a call-by-call basis. A 'permanent virtual connection,' however, is not so 'permanent' as the term would suggest. Any subscriber located on a packet-switched network can request the establishment of a permanent virtual connection connecting its own computers with those of any other subscriber. Indeed, it appears that customers can easily create and tear down different permanent virtual connections to different destinations on the network, giving them a degree of 'switched' functionality." *Advanced Services Order*, para. 73

service would meet this requirement because the DSL telecommunications service subscribed to both originates and terminates within the calling area subject to the DSL charge. Namely, the DSL service ends when the communication is handed off to the providers ATM or frame relay network Significantly, the statutory definition does not state that the telecommunications sent by the subscriber must originate and terminate in the area subject to the local calling charge. Rather, the statute speaks of origination and termination of the "telecommunications service." Thus, assuming *arguendo* that the telecommunications continues past the termination of the DSL service, this is not relevant to the statutory definition. For the same reason, the fact that the communications sent or received by the subscriber may be jurisdictionally interstate is irrelevant to the statutory definition since the statute speaks of origination and termination of the service, not the underlying telecommunications.

In any event, Focal, Adelphia, and KMC do not believe that Part B requires that the telecommunications service both originate and terminate within the area covered by the DSL charge. Rather, the statute is best interpreted to mean that the telecommunications service may originate <u>or</u> terminate within the area covered by the single service charge because it speaks of the subscriber being able to originate and terminate the service. Thus, the subscriber can only originate and terminate the service at his location. The other party that sends a message to, or receives a message from, the subscriber performs the origination or termination at the other end. Or, arguably it is the DSL provider that terminates the service when communications are handed off, or received from, an ISP. Thus, the statutory definition can best be read to require only that the subscriber be able to originate and terminate the telecommunications service at his location. This the subscriber can do regardless of the location of the other end of the telecommunications

service. Therefore, the Part B definition is met for DSL service because the subscriber can originate and terminate the service at his location - regardless of where the other end of the service, or an individual communication, is located.

US WEST's view of telecommunications that is "comparable" to exchange service pursuant to section 153(147)(B) is flatly inconsistent with the law and the facts. According to US WEST, this addition to the pre-existing definition of local exchange service only includes: " ... those services that are 'comparable' to those described in the preexisting language -- again, two-way, any-to-any, switched local services."[13] Based on this, US WEST concludes that DSL does not qualify as exchange service under subsection (B) because: " ... DSL services are not a market substitute for ordinary two-way switched local calling. They are high-speed data services that are marketed as a supplement to, not a substitute for, basic local service"[14]

First of all, US WEST's claim that the preexisting statutory definition somehow limits local services to "basic local service" is a complete invention. The language actually refers to "intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." 47 U.S.C. sec. 153(147)(A). US WEST is correct that the POTS version of basic local service certainly falls within the preexisting definition, but so does ISDN service, which is typically tariffed in local exchange tariffs, and provides local exchange dialtone, along with data speeds of 128 kps.

Second, the inclusion of ISDN in the preexisting definition demonstrates that xDSL services clearly fall within subsection B. One version of xDSL happens to be IDSL, which

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13 Brief of US WEST filed May 17, 1999, in D.C. Circuit No. 98-1410.

14 *Id.* at 25.

operates at the same data speed as ISDN, but is not switched. The data speeds provided by the two services are identical from the viewpoint of an end user, the only difference being that one is switched and the other is not.[15]

In short, the data services provided by ISDN are already firmly within the previously existing definition, and are totally comparable to the data services provided by xDSL, the only difference being differing data speeds and pricing.[16]

Accordingly, the Commission should conclude that advanced services constitute telephone exchange service.

THERE IS NO STATUTORY "INFORMATION ACCESS" REGULATORY CATEGORY SUFFICIENT TO IMMUNIZE INCUMBENT LECS FROM SECTION 251(C) OBLIGATIONS

Section 251(g) of the Act provides that equal access obligations applicable to provision of exchange access, "information access," and local exchange service by a LEC under any consent decree in effect on the date of enactment of the 1996 Act shall continue in effect until explicitly superseded by Commission regulations.[17] This reference to "information access"merely incorporates terminology used in the *Modification of Final Judgment* for the limited purpose of

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[15] POTS service can also be used to provision data access to ISPs at speeds of 56 kps with the addition of a modem by an end user, a speed not much less than the slowest version of xDSL.

[16] For end users seeking to reach ISPs, these services differ only in their trade-off between speed versus cost. Those break-points may well differ depending on whether the end user employs a modem, ISDN, or xDLS, but they still remain comparable in the same way that a car buyer at a dealership compares full-size cars versus compact models. They all move data, and it's irrelevent for the "comparable" test whether or not switching happens to be involved.

[17] 47 U.S.C. Section 251(g).

continuing in effect equal access and other obligations pending a transition to Commission rules under the new Act. It would grossly distort this reference to "information access" to convert it into a new, otherwise undefined statutory category applicable to advanced services when this might have the momentous consequence of excluding all incumbent LEC provision of advanced services from Section 251 obligations. Focal, Adelphia, and KMC submit that if Congress had intended to create a new regulatory category of incumbent LEC service that would be exempt from Section 251 obligations it would have done so directly by establishing a definition of "information access" and providing that it would not be subject to Section 251. Congress provided a mechanism for removal of Section 251 obligations - forbearance under Section 10 subject to the limitations of subsection (d). It did not intend for the Commission to establish sweeping deregulation of advanced services by the trick suggested by US West of establishing a new, non-existent regulatory category for them.

CONCLUSION

For these reasons, the Commission should determine that advanced services constitute "telephone exchange service" under the Act.

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Dated: September 24, 1999

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CERTIFICATE OF SERVICE

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I hereby certify that a true and correct copy of the foregoing was hand delivered this 24th day of September, 1999, to the persons listed below.

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